Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO._____

78-978

INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION,
LOCAL 13,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on October 16, 1978.

1321

OPINIONS BELOW

The opinion of the court below is reported at 581 F.2d 132. A copy of the opinion is attached to this petition as Appendix "A". The opinion of the National Labor Relations Board is reported at 228 NLRB 174. A copy of the opinion, which incorporates the decision of the Administrative Law Judge, is attached to this petition as Appendix "B".

JURISDICTION

The opinion of the Court of Appeals was filed July 21, 1978. A timely petition for rehearing was denied on September 19, 1978. A copy of the order denying the petition for rehearing is attached to this petition as Appendix "C". The judgment of the Court of Appeals was entered on October 16, 1978. A copy of the judgment is attached to this petition as Appendix "D". This petition for Writ of Certiorari is being filed within 90 days of entry of the judgment. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether a labor union may, without violating §§8(b)(1)(A) and (2) of the National Labor Relations Act, unilaterally impose upon a member a job related penalty for violating a valid, internal rule essential to the union's existence as a voluntary association, so long as it provides the member with the option to give up membership and escape the penalty.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are relevant portions of §§8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A) and (2):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; ***

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsections (a)(3) of this Section, or to discriminate against an employee with respect to whom membership in such an organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

The essentially undisputed facts are as follows:

International Longshoremen's and Warehousemen's Union, Local 13 (Union) has, for many years, been the exclusive bargaining representative of workers performing longshore labor in the Los Angeles-Long Beach harbor area. The Union has a collective bargaining agreement with the Pacific Maritime Association (PMA), the representative of various employers engaged in longshore operations. Pursuant to the collective bargaining agreement, the Union and PMA jointly administer a dispatch hall from which longshore workers, whether or not they are Union members, are dispatched to jobs.

The collective bargaining agreement prohibits discrimination in favor of or against any longshore worker because of membership or nonmembership in the Union. The agreement does, however, make nonmember dispatching dependent upon a worker's payment of a pro rata share of dispatch expenses. The Union's constitution, by-laws and general rules applicable to its members only, provide for the payment dues on the first of each month, with a grace period to the 15th of the following month. They also provide that members must pay all fines, assessments and other indebtness before dues will be accepted.

Larry Sullivan, a 20-year member of the Union, with knowledge of the provisions of the Union constitution, by-laws and general rules, and the collective bargaining agreement, was late in the payment of his Union dues. At the end of the grace period allowed him under Union rules, he offered a sum of money to a clerk in the Union business office, which was an amount insufficient to pay the fines, assessments and dues he owed. His money was rejected and he became delinquent. Two days later he was dispatched from the dispatch hall to a job. There he was approached by a Union representative, who, after ascertaining that Sullivan was still delinquent, asked him to call a replacement and leave the job. Sullivan refused. The next day, Sullivan paid his fines, assessments and dues. The Union representative filed an internal complaint against him for conduct unbecoming a

Union member.

The matter went to the Union Grievance Committee, which, after a hearing, penalized Sullivan by barring him from use of the dispatch hall for 30 days, 20 days suspended. Sullivan appealed to the Union's Labor Relations Committee, which upheld the Grievance Committee. The Union Executive Committee reviewed the matter and reminded Sullivan that he could avoid the penalty by giving up his membership and taking advantage of the pro rata provision of the collective bargaining agreement. Sullivan was told that by going pro rata he would be free of any Union control over him. He rejected the option, insisted upon retaining his membership in the Union and agreed to abide by the constitution, by-laws and general rules. The Executive Committee denied his appeal. The matter was then presented to the full membership of the Union, which sustained the prior action of its committees. The original penalty was imposed and Sullivan lost his dispatch privilege for ten days.

While Sullivan's case was going through its intra-Union appeals, the Union posted a notice to its membership concerning dues and assessments. After reciting the applicable provisions of the constitution, by-laws and general rules, the notice said,

> "This means that the Officers have instructed the girls in the dues offices that if payments are not made on Caucus and

Convention assessments and fines, dues will not be accepted and You Will Not Be Allowed To Work."

The Board found that by suspending Sullivan's dispatch privilege, the Union had violated §§8(b)(1)(A) and (2) of the Act, and that by instituting internal disciplinary proceedings against Sullivan for refusing to leave the job while he was delinquent and by posting its notice to its members concerning the potential consequences of their financial delinquency, the Union had violated §8(b)(1)(A). The Board made its order accordingly. The court below affirmed and ordered enforcement, disregarding the fact that the Union had acted solely to enforce a membership rule, had scrupulously followed its own internal procedures, had unilaterally imposed discipline on its member, without in any way involving PMA, and had provided its member with a means to escape all Union control and the job related discipline. The court rejected the Union's contention that by providing an escape hatch from its discipline, the Union had acted precisely in the manner sanctioned by this court in Scofield v. NLRB, 394 U.S. 423, 430 (1969), when it said that §8(b)(1) leaves a union free to enforce its valid rule against its members who may leave the union and escape the rule.

REASONS FOR GRANTING THE WRIT

1. The decision below is premised upon prior decisions of this court whose implications need clarification in light of the interpretation placed upon them in this case.

In enacting the Taft-Hartley amendments to the National Labor Relations Act (Act), Congress disavowed any "desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom." NLRB v. Allis Chalmers Manufacturing Co., 388 U.S. 175, 185 (1967). Congress wished to legislate with respect only to union activity affecting the status of employees, not with respect to union activity affecting the status of members. " 'But the committee [of the Senate] did wish to protect the employee in his job if unreasonably expelled or denied membership.' " Ibid. The Congressional intent to distinguish between union unfair labor practices and legitimate union regulation of membership is embodied in the §8(b) proviso exempting from the section's enumeration of a labor organization's unfair labor practices a union's "own rules with respect to the acquisition or retention of membership therein." (29 U.S.C. §158(b)(1)(A).

The essence of the distinction intended by Congress was synthesized by this court in Scofield v. NLRB, supra., 394 U.S. 423, when it said,

"Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects

a legitimate union interest, impairs no policy the Congress imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."

(394 U.S. at 430).

Relying upon the "internal-external" distinction drawn in NLRB v. Boeing Co., 412 U.S. 67 (1973) the court below held inapplicable to the disciplinary measure taken by the Union in this case, the Scofield "escape hatch" principle. Yet, the court recognized, as indeed has everyone connected with this case, that the Union acted to enforce a rule against its member only. The rule had been adopted in accordance with the Union's constitution, by-laws and general rules. It reflected not merely a legitimate, but a critical Union interest. It was enforced by an impeccably correct, democratic procedure. No Congressionally mandated policy was impaired by the rule. In fact, the rule had been promulgated to insure the financial ability of the Union to exist as an organization, a purpose indisputably approved by Congress. Finally, as the court below conceded, the Union would not, could not and did not try to enforce its rule against an unwilling person.

"The Union Executive Board reviewed the matter and advised Sullivan that he could avoid the penalty by dropping his membership in the Union and converting to the 'pro -

rata status'****So he could have. . . ."

(Appendix A, pages A-3, A-5)

The court below misplaced its reliance upon Boeing. The case at bar is simply not a Boeing situation. Here there never has been any contention by the Union that it is entitled to discipline a member after he has opted for pro rata status. Quite the contrary: the Union has consistently maintained that it has no right unilaterally to discipline an employee after he has given up union membership, for a breach of union rules committed while he was still a member.

This is merely a case in which the union enforced a valid, internal rule by affecting a member's status in the union. Neither the rule nor its enforcement touched upon nonmembers' employment status. The union imposed its discipline without involving the employer, without changing or seeking to change the employment relation. No collective agreement was implicated. As the area arbitrator decided in ruling on the grievance brought by PMA as a result of the Sullivan discipline: "The Union did not violate any terms of the PCLCD [collective bargaining agreement] in conducting the trial and assessing a penalty in the case of their member . . . ." (Respondent's [Union's] Exhibit 4 before the Board).

The court below used the "internal-external" language of Boeing as though it were a litmus paper test. It would appear that, contrary to its opinion, a Scofield-

type option creates a crucial distinction between "internal" discipline affecting membership status and "external" discipline affecting employment status. The option assures that it is the employee, not the union member, who has the key to his job in his pocket. Cf. Booster Lodge 405, Machinists v. NLRB, 412 U.S. 84 (1973)

The court below misconceived the implications of Scofield and Boeing in the circumstances of this case. Its construction of those cases justifies a grant of certiorari to review the judgment below.

2. The decision below interferes with a significant right reserved by Congress to a labor organization.

The right of a union to set and enforce its membership obligations is one of its vital concerns. A union is, after all, a voluntary association. NLRB v. Retail Clerk's Union, Local 1179, 526 F.2d 142, 145 (9th Cir. 1975). It must look to the self-discipline of its members for its very existence. The president of the Union explained the significance of the right involved in this case at the arbitration hearing:

> [W]e have a clear-cut demarcation .... as to what their rights and prerogatives are as it applies to their members, and once they cross that demarcation into the internal affairs of the Union, it is going to create chaos. By law and by tradition and by the self-autonomous rules imposed on themselves by the rank and file to discipline their men—not to have this .... would be deplorable, with men going every which-way. In order to maintain ... order and ... discipline ... the Union must maintain ... procedure and regulations in order that the men don't go off half-cocked in doing their thing.

(Respondent's [Union's] Exh. 3, p. 23, before the Board).

The decision below represents a unique incursion by the Board into the exclusive preserve of a union: control over its membership by fair, democratic and unilateral sanctions. It creates an ipse dixit in the law, penalizing a union for refusing to affect a non-member's employment status. Compare e.g., NLRB v. Bricklayers Local No. 7, 563 F.2d 977 (9th Cir. 1977). Such prior decisions as are at all similar involve attempts by unions, through employers, to affect the jobs of non-members, persons with the equivalent of pro rata status. E.g., NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975); NLRB v. International Brotherhood of Boilermakers, 409 F.2d 922 (10th Cir. 1969). Hence, this case stands as the furtherest extension of the Board's power to reach a union's regulation of its membership.

Because the decision below markedly affects an area of union concern so vital that Congress expressly provided for it in §8(b)(1)(A) of the Act, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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GEORGE E. SHIBLEY

By MARTHA GOLDIN
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13, Respondent.	NO. 77-2313 OPINION

FILED
Jul. 21, 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

Application For Enforcement of An Order of
The National Labor Relations Board

Before: SNEED and KENNEDY, Circuit Judges, and CALLISTER,* District Judge.

SNEED, Circuit Judge:

The underlying question presented by this appeal is whether a refusal by a union to permit a member to work for the employer for a ten-day period, as a sanction imposed by the union on the member for his failure to pay when due certain fines and assessments, constitutes an unfair labor practice prohibited by sections 8(b)(1)(A)

Hon. Marion J. Callister, United States District Judge for the District of Idaho, sitting by designation.

and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) and (2). We hold that it does and, consequently, grant enforcement of the National Labor Relations Board's order.

The facts, in a somewhat condensed form, as found by the Board are these. The International Longshoremen's and Warehousemen's Union Local 13 (Union) and the Pacific Maritime Association (PMA), the collective bargaining representative of various employers engaged in longshore and stevedoring operations, are parties to a collective bargaining agreement which, although it does not contain a provision requiring employees to be members of the Union as a condition of employment, does require that employees of PMA employers be dispatched through a hall administered jointly by the Union and the PMA. The agreement further provides that there be no discrimination between members of the Union and nonmembers in dispatching, so long as nonmembers pay the "pro rata share of the expenses related to the dispatching hall, the Labor Relations Committee, etc." The Union's constitution, by-laws and general rules fix the date that membership dues are due and payable and also provide that all "fines, assessments or other indebtedness must be paid before your dues will be accepted."

Larry Sullivan, a member of the Union since 1953, offered to pay within the time allowed his dues but not certain fines and assessments which he owed. The dues,

unaccompanied by payment of the fines and assessments, were refused by the Union. Thereafter, Sullivan became delinquent with respect to his dues. On Sunday, January 18, 1976, two days after he became delinquent, Sullivan was sent from the dispatch hall to a job and was there at the jobsite approached by the Union's Business Representative who requested that Sullivan call a replacement for himself and leave the job. Sullivan refused. On the next day, Sullivan paid his dues together with the fines and assessments.

On the same day, Monday, January 19, 1976, the Business Representative filed an "internal complaint" against Sullivan and on March 2, 1976 a grievance committee was convened. After a hearing the committee imposed a penalty against Sullivan consisting of barring his use of the dispatch hall for 30 days, of which 20 were suspended. Sullivan appealed to the labor relations committee which denied his appeal. The Union Executive Board reviewed the matter and advised Sullivan that he could avoid the penalty by dropping his membership in the Union and converting to the "pro rata status." He was advised that this would relieve him of any control by reason of membership by the Union. Sullivan rejected the suggestion and the Executive Board denied his appeal. Thereafter, his appeal was submitted to a meeting of the full membership where again it was denied. On April 2, 1976 the penalty was imposed and for a period of ten days Sullivan was denied use of the

dispatch hall.

During the pendency of the Sullivan appeals, the Union, in a notice to the membership and after reciting the provisions of the constitution, by-laws and general rules applicable to dues, fines and assessments, stated that, "This means that officers have instructed the girls in the dues office that if payments are not made on Caucus and Convention assessments and fines, dues will not be accepted and you WILL NOT BE ALLOWED TO WORK." (Emphasis in original).

The Board found that the Union had violated the Act in three respects. It violated section 8(b)(1)(A) and (2) by threatening to refuse and by refusing to dispatch Sullivan for a ten-day period because he failed to comply with a rule concerning the payment of fines, and assessments. Second, the Union violated section 8(b)(1) (A) by threatening to institute, and by instituting disciplinary action against Sullivan for his failure to leave the jobsite on Sunday, January 18, 1976. Finally, the threats to prevent other members from working if they do not properly pay fines and assessments violated section 8(b)(1)(A). The Board's order, which we will not recite in detail, was properly fashioned to respond to these vioations, providing the Board correctly interpreted the Act.

As we have indicated, we believe it did. The Supreme Court in NLRB v. Boeing Co., 412 U.S. 67, 73-74 (1973) observed:

"In Scofield [Scofield v. NLRB, 392 U.S. 423

(1969)] we decided that Congress intended to distinguish between the external and internal enforcement of union rules, and therefore the Board would have authority to pass on those rules affecting an individual's employment status but not on his union membership status."

Scofield, at 394 U.S. 428, quoted NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 195 (1967) to the effect that section 8(b)(1)(A) was intended by Congress to permit a union to enforce its internal regulations as it saw fit "aside from barring enforcement of a union's internal regulations to affect a member's employment status." This court has recognized this limit on union power. See, NLRB v. Retail Clerks Union, Local 1179, 526 F. 2d 142, 145, n.2 (9th Cir. 1975).

The issue thus becomes whether the Board was correct in finding that the Union's actions here questioned were an attempt to enforce the union's internal regulations by "affecting an individual's employment status" rather than his union membership status. We hold that the Board was correct. The enforcement was to deprive Sullivan of work. Nothing more profoundly affects "an individual's employment status."

The Union attempts to refute this proposition by pointing out that Sullivan could have avoided the loss of work by surrendering his membership in the Union. So he could have; but the Board's characterization of the

Union's action remains valid. To present a union member with the Hobson's choice between surrender of his membership or temporary loss of employment cannot be characterized fairly as action not "affecting an individual's employment status." It is sophistry to insist otherwise.

Finally, the Union argues that Sullivan at the general membership meeting waived his right to initiate proceedings before the Board. The Administrative Law Judge and the Board found otherwise and substantial evidence in the record as a whole supports this finding.

ENFORCE THE ORDER.

FPW

228 NLRB No. 174

D—2317
Long Beach, Calif.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL
LONGSHOREMEN'S
AND WAREHOUSEMEN'S
UNION, LOCAL 13,
(Pacific Maritime Association)

and

Case 21—CB—5631

LARRY SULLIVAN, an
Individual

DECISION AND ORDER

On December 16, 1976, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief [1/] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

1/ Respondent contends, inter alia, that it was deprived of due process by the Board's denial of the request, dated December 28, 1976, of its counsel for an extension of time to April 15, 1977, to file exceptions and a brief on the ground that an exacerbation of rheumatic heart disease seriously limited his work capacity and that he was scheduled to undergo open heart surgery on January 17. As the Board granted an extension to January 17, another attorney was afforded sufficient time to study the record and issues herein and on that date filed exceptions and a brief which ably present Respondent's case. Accordingly, we find there was no deprivation of due process and we shall therefore deny Respondent's request that its original counsel now be permitted to file supplemental exceptions and a brief by April 15, 1977.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, International Longshoremen's and Warehousemen's Union, Local 13, Long Beach, California, its officers, agents, and representatives, shall take the action set forth in said recommended Order.

Dated, Washington, D.C. April 12, 1977

John H. Fanning, Member

John A. Penello, Member

Peter D. Walther, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD-(SF)-291-76
Long Beach, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

INTERNATIONAL
LONGSHOREMEN'S
AND WAREHOUSEMEN'S
UNION, LOCAL 13,
(Pacific Maritime Association)

and Case 21—CB—5631

LARRY SULLIVAN, an
Individual

Edward P. Nichols, of Los Angeles,
Calif., appearing for the General
Counsel.
George E. Shibley, of Long Beach,
Calif., appearing for the Respondent.

DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Los Angeles, California, on August 5, 1976. 1/ On May 20, the Regional Director for Region 21 of the National Labor Relations Board issued a complaint and a notice of hearing, based upon an unfair labor practice charge filed

1/ Unless otherwise stated, all dates occurred in 1976.

on April 8, alleging violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Pacific Maritime Association, herein called PMA, is a California corporation with offices and places of business in Wilmington and San Francisco, California, and is the collective-bargaining representative, on a multi-employer basis, of its various employer-members in longshore and stevedoring operations in and about the vicinity of the ports of Los Angeles and Long Beach, California, and other Pacific Coast ports. The employer-members of PMA annually derive revenue in excess of $50,000 from the transportation of goods and passengers between the State of California and other states and foreign countries. Therefore, I find that at all times material, PMA and its employer-members have been employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

At all times material, International Longshoremen's and Warehousemen's Union, Local 13, herein called Respondent, has been a labor organization within the meaning of Section 2(5) of the Act.

III. Issues

1. Whether, for a 10-day period in April, Respondent refused to dispatch Larry Sullivan to work for employer-members of PMA for reasons other than his failure to tender his dues, which included his share of the expenses of the dispatching hall administered jointly by PMA and Respondent, and if so, whether Respondent thereby violated Section 8(b)(1)(A) and (2) of the Act.

2. Whether Respondent threatened to and did institute discipline against Larry Sullivan for refusing to voluntarily remove himself from his job for reasons other than his failure to tender dues, and if so, whether Respondent thereby violated Section 8(b)(1)(A) of the Act.

3. Whether Respondent threatened to prevent members from working if they did not pay fines and assessments, and if so, whether Respondent thereby violated Section 8(b)(1)(A) of the Act.

IV. The Alleged Unfair Labor Practices

A. The Facts

For the most part, there is no dispute regarding the operative facts in this matter. Respondent and PMA have been parties to a collective-bargaining agreement.

That agreement contains no provision requiring employees to be members of Respondent as a condition of employment. It does, however require that employees of PMA must be dispatched through a dispatch hall administered jointly by Respondent and PMA. It further requires that there be no discrimination between members and nonmembers of Respondent in dispatching, so long as the latter pay the "pro rata share of the expenses related to the dispatching hall, the Labor Relations Committee, etc." Respondent did not dispute the testimony that at the time material herein, the pro rata share was $21 per month.

With regard to its members, Respondent's constitution, by-laws and general rules set forth two substantive requirements pertinent to this proceeding. The first provides that dues are owing and payable on the first day of each month, but Respondent allows a grace period until the 15th of the following month for payment of the amount owing. The second provision requires that, "All fines, assessments or other indebtedness must be paid before your dues will be accepted."

On Thursday, January 15, Larry Sullivan, a member of Respondent since 1953, reported to Respondent's business office to pay his dues for the month of December 1975. The testimony was conflicting with respect to the total amount which Sullivan owed Respondent for dues, fines and assessments. However, there is agreement that Sullivan lacked sufficient funds to pay

for all items which he owed, although it is undisputed that he did possess sufficient funds to pay the amount which he owed for his dues. Moreover, the amount which he possessed would also have been sufficient to cover the pro rata share had he been a nonmember of Respondent. 2/ As Sullivan lacked sufficient funds to pay all fines and assessments levied against him, the clerical employee of Respondent with whom Sullivan spoke declined to accept the dues payment which Sullivan proffered, appparently relying upon the above-quoted provision in Respondent's constitution, by-laws and general rules. Due to the need to take his mother to the doctor and to a malfunction in his automobile on the following day, Sullivan did not return to the business office on Friday, January 16. Since the business office was closed during weekends, it was not until Monday, January 19 that he paid the full amount, including fines and assessments, owing to Respondent.

In the meantime, Sullivan did go to the dispatch hall and was dispatched to a job on the evening of Sunday, January 18. There he was approached by Business Representative Paul Loveridge, who inquired if Sullivan

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2/ No issue was raised concerning the time period for payment of the pro rata share, and accordingly, there is no contention that there was any difference in the grace period accorded nonmenbers for paying such sums than for members' dues payments.

had paid the monies owing to Respondent and who insisted that Sullivan call a replacement when the latter explained what had occurred at the business office on January 15. Sullivan, relying upon the fact that he had tried to pay part of what he owed, refused to call a replacement. On Monday, January 19, Loveridge filed an internal complaint against Sullivan, charging him with "Conduct Unbecoming a Union Brother" and asserting in support thereof: "I went to the job LB 21 where this brother was driving crane. I asked him if his dues was paid and he said no. I asked him to call a replacement and he refused."

A grievance committee convened on March 2, and after a hearing, imposed a penalty against Sullivan which barred his use of the dispatch hall for 30 days, 20 days of which were suspended with the result that the penalty entailed a 10-day interruption in Sullivan's ability to be dispatched to PMA. Thereafter, the matter progressed through a series of meetings before different bodies — on March 3 and 10 before the labor relations committee, on March 25 before Respondent's executive board and on April 1 before a meeting of Respondent's membership. Sullivan's appeals were denied and the 10-day penalty was ultimately imposed from approximately April 2 to 12, though Sullivan made efforts to be dispatched during this period. Two points, should be noted with regard to these various meetings. First, it is clear, and I find, that

during the course of these proceedings, Sullivan was advised that he could avoid any interruption in dispatching by dropping his membership in Respondent and converting to pro rata status, thereby, as explained to him by Respondent's officials, depriving Respondent of any control over him as a member. However, Sullivan rejected this alternative and insisted upon retaining his membership.

Second, there was a dispute regarding whether Sullivan agreed to acquiesce in Respondent's disciplinary decision. Arturo Almeida, Respondent's current president, testified that at the general membership meeting, Sullivan had been asked if "he wanted to be part of the organization and was willing to abide by the rules and regulations and the consequences of being a member of Local 13." While Almeida testified that "consequences" had meant acceptance of the general membership's decision, it was not altogether clear from his testimony whether this had been clearly explained to Sullivan at the time, particularly as Raul Olvera, Respondent's secretary-treasurer, made no reference to this particular exchange. What all of the witnesses — Sullivan, Almeida and Olvera — did describe as having occurred at that meeting was a discussion arising from Sullivan's expressed desire to be represented before the general membership by outgoing President Rubio, in which it was explained to Sullivan that if he decided to be represented, he would have to abide by Respondent's rule that

he could not speak on his own behalf and that he would have to abide by those consequences. For example, Olvera testified that when Sullivan had asked Almeida about representation by Rubio, "I said, 'Time out, Art. You better tell him that there aren't any rebuttals and does he wish' — I have it here: 'Would he be willing to accept the consequences of the appeal?' " Thus, testified Olvera:

> [Almeida] asked Larry, he says, that "Almeida interjected and told Sullivan that after Brother Rubio stated his position" — was he aware of this — "after Brother Rubio stated his position, there would be no rebuttal and would he be willing to accept the consequences to this appeal?"

Sullivan conceded that he had told Respondent's agents that he would abide or live with Respondent's constitution, by-laws and general rules. However, he testified that he had made such statements in reply to questions concerning whether he intended to remain a member of Respondent, rather than convert to pro rata status. He denied ever having been asked whether he was willing to accept union discipline and abide by Respondent's decision in the dispute concerning the delay in the January payments. He further testified that the only agreement which he had made with respect to the disciplinary proceedings was that he was willing to permit Rubio to represent him before the general

membership and would accept the decision rendered without insisting upon speaking on his own behalf.

In March, while Sullivan's case was wending its way through the various steps leading to the April membership meeting, Respondent issued a notice to its members regarding "Dues Increase and Assessment." The notice first summarized the financial obligations of members, taking into account the monthly dues, a death assessment and installment payments on an additional $34 assessment. After reciting the above-quoted provision of the constitution, by-laws and general rules pertaining to payment of "fines, assessments or other indebtedness" before dues would be accepted, the notice then reads: "This means that the Officers have instructed the girls in the dues office that if payments are not made on Caucus and Convention assessments and fines, dues will not be accepted and you WILL NOT BE ALLOWED TO WORK."

B. Analysis

Respondent concedes that its conduct in this case was based upon its internal rule whereby members' dues would not be accepted until all fines and assessments were paid. As the effect of not accepting dues was to bar members' access to the dispatch hall, and therefore to employment with PMA, the General Counsel contends that Respondent's conduct violated Section 8(b)(1)(A) and (2) of the Act.

Integral to the policy underlying both Sections 8(b)(1)(A) and (2) of the Act was the intent to separate

membership obligations owed by employees to their labor organizations from the employment rights of those employees. "The policy of the Act is to insulate employees' jobs from their organizational rights." Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 40, 74 S. Ct. 323, 335 (1954). More specifically, Section 8(b)(1) and (2) and Section 8(a)(1), (2) and (3) of the Act "form a web, of which §8(b)(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." Scofield v. N.L.R.B., 394 U.S. 423, 428-429, 89 S. Ct. 1154, 1157 (1969). Similarly, "§§8(a)(3) and 8 (b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." Radio Officers' Union, supra. Consequently, while a labor organization is free, under the proviso to Section 8(b)(1)(A), "to prescribe its own rules with respect to the acquisition or retention of membership therein," its ability to enforce such rules is restricted by "barring enforcement of a union's internal regulations to affect a member's employment status." N.L.R.B. v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 195, 87 S. Ct. 2001, 2014 (1967). For example, while a labor organization may freely fine a member for violation of a membership rules, "the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without triggering

violations of §§8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3)." Scofield, supra.

An exception to this prohibition against labor organization interference with employees' employment is provided under Section 8(a) (3) of the Act, allowing labor organizations to seek the discharge of employees who have failed to comply with agreements requiring "as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement . . . ." Yet, this is a quite limited exception, for "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." N.L.R.B. v. General Motors Corp., 373 U.S. 734, 742, 83 S. Ct. 1453, 1459 (1963). "If the union imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job." Union Starch & Refining Company, 87 NLRB 779, 784, enfd. 186 F.2d 1008 (C.A. 7, 1951), cert. denied 342 U.S. 815 (1951). 3/

3/ A labor organization may also take action which interferes with employment "in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency." International Union of Operating Engineers, Local 18, AFL-CIO (William F. Murphy), 204 NLRB 681. However, this defense would not be applicable to the situation presented by the instant case and it has not been raised by Respondent.

Respondent had no union security clause in its agreement with PMA. It operated an exclusive dispatch hall through which it dispatched employees to PMA. It threatened to refuse to dispatch members from that hall for failure to pay fines and assessments levied against them. It threatened to and did institute discipline against Sullivan, leading to his being barred from dispatch for a 10-day period, because he had failed to pay the fines and assessments levied against him, even though he had tendered an amount sufficient to satisfy either the dues which he owed or a pro rata share. While there is no dispute concerning the validity of the obligation to pay these fines and assessments, the General Counsel does contend that Respondent's method of enforcing payment—involving an employment-related sanction—does violate the Act. The foregoing analysis amply supports that contention. "While it might well be convenient for the Union, in enforcing its own internal rules of conduct, to have available an employment-related sanction, it can hardly be said that such severe sanctions are necessary to that end," Operating Engineers, Local 18, supra.

Therefore, I find that by refusing to dispatch Larry Sullivan for work for employer-members of PMA for

reasons other than his failure to tender his dues, which included his share of the expenses of the dispatching hall, Respondent violated Section 8(b)(1)(A) and (2) of the Act. 4/ Moreover, by threatening to and by instituting discipline against Sullivan for refusing to voluntarily remove himself from his job for reasons other than his failure to tender dues and, further, by threatening to prevent members from working if they did not pay assessments and fines, Respondent violated Section 8(b)(1)(A) of the Act.

However, this does not end the matter insofar as the interruption of Sullivan's dispatches is concerned. Respondent urges, in essence, two additional points. First, it is argued that when Sullivan was offered the option of relinquishing his membership and of switching to pro rata status, prior to the actual implementation of the penalty imposed by the grievance committee, he was accorded an option that would have preserved his right to continue being dispatched without interruption. Rather than accept pro rata status, Sullivan insisted upon continuing his membership in Respondent, even though advised that

4/ While the General Counsel did not show specific jobs to which Sullivan could have been dispatched during the 10-day period that he was barred from the hall, such a showing is not necessary to establish a violation. See Utility and Industrial Construction Company, 214 NLRB 1053 and cases cited in footnote 2.

by such insistence he would be subject to the penalty of being barred from the dispatch hall for 10 days. In these circumstances, argues Respondent, Sullivan may not now complain of the penalty, since he had a means of escaping it by leaving Respondent's membership and continuing to be dispatched on a pro rata basis.

In making this argument, Respondent relies upon the results reached in Allis-Chalmers, supra, and Scofield, supra. Yet, in Allis-Chalmers, the union had fined its members and in Scofield, the penalties had been fines and suspensions from membership. In both cases, the Supreme Court distinguished between internal and external enforcement of union rules, with the latter mode of enforcement being defined as involving interference with a member's employment and being condemned as prohibited by the Act. Allis-Chalmers, 388 U.S. at 195, 87 S. Ct. at 2014; Scofield, 394 U.S. at 428-429, 89 S. Ct. at 1157. In essence, therefore, Respondent's argument is an effort to compare apples and oranges, for it attempts to apply the principles of internal sanctions to situations where external sanctions have been applied. Yet, Congress has prohibited the latter in circumstances such as are present in the instant case. In fact, this argument is the same as that advanced by the dissenting Board member in International Brotherhood of Teamsters, etc. (Frank Boston), NLRB 1494, one of the cases considered by the Supreme Court in Radio Officers' Union, supra. It was an argument rejected in that case

and it must, accordingly, be rejected here. Therefore, I find that Respondent cannot escape liability for its violations of Section 8(b)(1)(A) and (2) by virtue of the fact that membership was not compulsory and that Sullivan could have been relieved of any interruption in dispatching by relinquishing his membership in Respondent and converting to pro rata status.

Respondent's second argument regarding Sullivan is that he specifically agreed to accept the discipline meted out by Respondent in this case. This argument is predicated upon the testimony concerning Sullivan's expressions of willingness to abide by Respondent's disciplinary decision. However, as pointed out above, Sullivan's statements in this regard appear to have been directed to questions regarding his desire to continue as a member of Respondent and regarding his willingness to waive speaking on his own behalf in return for representation by Rubio at the April general membership meeting. The latter, of course, would not constitute a waiver of a statutory right to protest the employment-related discipline imposed by Respondent and, as found above, Respondent is not entitled to rely upon Sullivan's desire for continued membership as a means of enforcing an internal rule in a manner proscribed by the Act. At no point was there testimony—either in this proceeding or during the proceeding before Area Arbitrator George Love—showing that Sullivan "consciously yielded or clearly waived" his right to statutory protection from

Respondent's employment-related sanction. See Unit Drop Forge Division, Eaton Yale & Towne, Inc. 171 NLRB 600, 601. Yet, at the very least, that must be established for a waiver argument to be advanced in the context of this case, since "Waiver of a statutory right will not lightly be inferred." C & C Plywood Corporation, 148 NLRB 414, 416, enforcement denied 351 F.2d 224 (C.A. 9, 1965), reversed and enfd. 385 U.S. 421, 87 S. Ct. 559 (1967). In these circumstances, Sullivan's statements regarding his willingness to abide by Respondent's rules, made in the context of his expressions of desire to continue being a member of Respondent rather than convert to pro rata status, and his expressed willingness to forego speaking on his own behalf in return for representation by Rubio, are not a sufficient basis for consideration of a waiver theory of defense to the employment-related sanction imposed against him.

In sum, it is not Respondent's right to impose fines and assessments which is under attack here nor is it Respondent's right to collect the specific fines and assessments owed by Sullivan which is at issue. Those rights are conceded by the General Counsel, as indeed he must. Nor does the General Counsel challenge the substance of Respondent's internal rule, making the payment of fines, assessments and other indebtedness the price for acceptance of dues. Such a rule, on its face, does not impinge nor threaten to impinge upon the employment of Respondent's members. Rather, this case

presents a challenge solely to Respondent's resort to its dispatch hall as a vehicle for enforcing the collection of fines and assessments—in short, Respondent's reliance upon "an employment-related sanction" to enforce an internal rule regarding the collection of fines and assessments. By resorting to this vehicle, Respondent has taken the step from internal enforcement to external enforcement of its rule, and in this manner has violated Section 8(b)(1)(A) and (2) of the Act.

V. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth above, occurring in connection with PMA's operations described in section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. International Longshoremen's and Warehousemen's Union, Local 13, is a labor organization within the meaning of Section 2(5) of the Act.

2. Pacific Maritime Association and its employer-members are employers within the meaning of Section2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. By threatening to refuse to dispatch and by

refusing to dispatch Larry Sullivan for a 10-day period in April 1976 because he had failed to pay fines and assessments, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

4. By threatening to institute discipline and by instituting discipline against Larry Sullivan for refusing to voluntarily remove himself from a job because he had not paid fines and assessments levied against him, at a time when he had tendered an amount sufficient to satisfy his statutory obligations, and by threatening to prevent other members from working if they did not pay fines and assessments, Respondent violated Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meanings of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

As there is no contention that Respondent has continued to bar Larry Sullivan from dispatch following completion of the 10-day period in April 1976 when he was barred from dispatch, I shall recommend that Respondent be required to make Sullivan whole for any loss of earnings he may have suffered by reason of the

unlawful conduct of barring him from use of the dispatch hall for the 10-day period in April 1976. Backpay is to be computed on a quarterly basis, making deductions for any interim earnings, with interest to be paid at the rate of 6 percent per annum. F. W. Woolworth Company, 90 NLRB 289; Isis Plumbing and Heating Co., 138 NLRB 716, enf. den. on different grounds, 322 F.2d 913 (C.A. 9, 1963).

The General Counsel further requests that Respondent be ordered "to publish and distribute to its membership a notice or bulletin advising its members that the policy set forth [in its March notice] is no longer in force and effect." However, no citations have been provided to support such a remedy and no facts have been adduced to show that the Board's normal notice-posting requirement would not be sufficient notification to Respondent's members of their rights in this regard. Accordingly, I do not recommend that such a remedy be granted.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 5/

5/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Threatening to refuse to dispatch and refusing to dispatch Larry Sullivan and other employees because they fail to pay fines and assessments levied against them.

(b) Threatening to institute and instituting disciplinary action against Larry Sullivan and other employees for refusing to voluntarily remove themselves from jobs because they have failed to tender amounts sufficient to fully pay fines and assessments levied against them.

(c) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Larry Sullivan for any loss of earnings which he may have sustained by reason of the discrimination against him in the maner set forth in "The Remedy" portion of this Decision.

(b) Preserve and upon request make available to the Board or its agents for examination and copying, all records necessary or useful to compute the backpay set forth in "The Remedy" portion of this Decision.

(c) Withdraw, rescind and give no further effect to any notice, memorandum, letter or statement which

can reasonably be construed as a record of the discipline imposed upon Larry Sullivan in April 1976 when he was denied dispatch for a 10-day period for reasons other than his failure to pay dues.

(d) Post at its business offices, meeting halls and dispatch hall copies of the attached notice marked "Appendix." 6/ Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(e) Mail to the Regional Director for Region 21 signed copies of said notices for posting by Pacific Maritime Association, if willing, in places where notices to employees are customarily posted. Copies of said

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6/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notices, to be furnished by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(f) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: December 16, 1976

William J. Pannier III
Administrative Law Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13, Respondent.	)	NO. 77-2313 ORDER

FILED
Sep. 19, 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court
of Appeals

Before: SNEED and KENNEDY, Circuit Judges, and
CALLISTER,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing. Judges Sneed and Kennedy have voted to reject the suggestion for rehearing en banc and Judge Callister has recommended that the suggestion for rehearing en banc be rejected.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc.

Hon. Marion J. Callister, United States District Judge for the District of Idaho, sitting by designation.

Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)
Petitioner,	)
v.	)
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13,	)
Respondent.	)

Endorsed, Judgment filed and entered October 16, 1978

Judgment

Before: SNEED and KENNEDY, Circuit Judges, and CALLISTER,* District Judge.

THIS CAUSE came to be heard upon an application of the National Labor Relations Board to enforce its order dated April 12, 1977, directed against Respondent, International Longshoremen's and Warehousemen's Union, Local 13, Long Beach, California, its officers, agents, and representatives. The Court heard argument of respective counsel on July 6, 1978, and has considered the briefs and transcripts of record filed in this cause. On July 21,

---

Hon. Marion J. Callister, United States District Judge for the District of Idaho, sitting by designation.

1978, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, International Longshoremen's and Warehousemen's Union, Local 13, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Threatening to refuse to dispatch and refusing to dispatch Larry Sullivan and other employees because they fail to pay fines and asessments levied against them.

(b) Threatening to institute and instituting disciplinary action against Larry Sullivan and other employees for refusing to voluntarily remove themselves from jobs because they have failed to tender amounts sufficient to fully pay fines and assessments levied against them.

(c) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, (herein after called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Larry Sullivan for any loss of earnings which he may have sustained by reason of the discrimination against him in the manner set forth in "The Remedy" portion of the Administrative Law Judge's

Decision a copy of which is attached hereto as Appendix A.

(b) Preserve and upon request make available to the Board or its agents for examination and copying, all records necessary or useful to compute the backpay set forth in "The Remedy" portion of Administrative Law Judge's Decision.

(c) Withdraw, rescind and give no further effect to any notice, memorandum, letter or statement which can reasonably be construed as record of the discipline imposed upon Larry Sullivan in April 1976 when he was denied dispatch for a 10-day period for reasons other than his failure to pay dues.

(d) Post at its business offices, meeting halls and dispatch hall copies of the attached notice marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 21, of the National Labor Relations Board, (Los Angeles, California), after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(e) Mail to the aforesaid Regional Director signed

copies of said notices for posting by Pacific Maritime Association, if willing, in places where notices to employees are customarily posted. Copies of said notices to be furnished by the said Regional Director, after being duly signed by Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(f) Notify the said Regional Director in writing, within 20 days from the date of this Judgment, what steps Respondent has taken to comply herewith. Costs of this court in favor of petitioner and against respondent.

Brief of petitioner	$118.02
Reproduction of costs	12.00
Total	$130.02

Endorsed, Judgment Filed and Entered

/s/ _____

Clerk

SO ORDERED:
JUDGES:

/A TRUE COPY,
October 16, 1978

ATTEST: /s/ Deputy

JOSEPH T. SNEED

ANTHONY M. KENNEDY

MARION J. CALLISTER

Appendix A

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

As there is no contention that Respondent has continued to bar Larry Sullivan from dispatch following completion of the 10-day period in April 1976 when he was barred from dispatch, I shall recommend that Respondent be required to make Sullivan whole for any loss of earnings he may have suffered by reason of the unlawful conduct of barring him from use of the dispatch hall for the 10-day period in April 1976. Backpay is to be computed on a quarterly basis, making deductions for any interim earnings, with interest to be paid at the rate of 6 percent per annum. F. W. Woolworth Company, 90 NLRB 289; Isis Plumbing & Heating Co., 138 NLRB 716, enf. den. on different grounds, 322 F.2d 913 (C.A. 9, 1963).

The General Counsel further requests that Respondent be ordered "to publish and distribute to its membership a notice or bulletin advising its members that the policy set forth [in its March notice] is no longer in force and effect." However, no citations have been provided to support such a remedy and no facts have been adduced to show that the Board's normal notice-posting requirement would not be sufficient notification to Respondent's

members of their rights in this regard. Accordingly, I do not recommend that such a remedy be granted.

Appendix B

NOTICE TO MEMBERS

"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to dispatch Larry Sullivan nor any other employee because he has failed to tender an amount sufficient to satisfy fines and assessments which we have levied against him.

WE WILL NOT threaten to refuse to dispatch nor threaten to prevent from working Larry Sullivan or any other employee as a means of compelling payment of fines and assessments and WE WILL NOT apply that portion of our March 1976 notice which states that employees who fail to pay fines and assessments will not be permitted to work.

WE WILL NOT threaten to nor institute discipline against any employee for refusing to leave a job for failing to pay fines and assessments.

WE WILL NOT in any manner restrain or coerce you in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL make whole Larry Sullivan for any loss of pay he may have suffered by reason of the discrimination practiced against him.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 13

(Labor Organization)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Eastern Columbia Bldg.
849 South Broadway
Los Angeles, CA 90014
Telephone No. (213) 688-5229

Supreme Court, U.S.
FILED
FEB 15 1979
MICHAEL RODAK, JR., CLERK

No. 78-978

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
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National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-978

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 581 F. 2d 1321. The decision and order of the National Labor Relations Board (Pet. App. B-1 to B-25) are reported at 228 N.L.R.B. 1383.

JURISDICTION

The judgment of the court of appeals (Pet. App. D-1 to D-8) was entered on October 16, 1978. The petition for a writ of certiorari was filed on December 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the union violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and 158(b)(2), by refusing to dispatch a member for work because of his late payment of union fines and assessments.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

Petitioner ("the Union") and the Pacific Maritime Association (PMA), at all relevant times, were parties to a collective bargaining agreement which required that PMA employees be dispatched through a hiring hall administered jointly by the Union and PMA. The agreement contained no provision requiring membership in the Union and barred discrimination between members and non-members in dispatching so long as non-members paid the "pro rata share of the expenses related to the dispatching hall, the Labor Relations Committee, etc." (Pet. App. B-6 to B-7).

On Thursday, January 15, 1976, longstanding Union member Larry Sullivan attempted to pay his monthly dues to the Union; after that date the payment would be past-due (Pet. App. B-7). Although the amount tendered by Sullivan was sufficient to cover his dues (as well as the pro-rata share that would have been required had he not been a member of the Union), it was not enough to cover all outstanding fines and assessments (Pet. App. B-7 to B-8). Accordingly, the Union would not accept his dues.[1]

[1]The Union's internal rules required that "All fines, assessments or other indebtedness" to the Union be paid by members before their monthly dues would be accepted (Pet. App. B-7).

On Sunday, January 18, Sullivan went to the dispatch hall and was sent to a job that evening. Union Business Representative Paul Loveridge approached Sullivan on the job and, having discovered that Sullivan had not paid the monies owed the Union, insisted that Sullivan call a replacement. Sullivan refused, noting that he had tried to pay part of what he owed (Pet. App. B-8 to B-9). The next day, Monday, January 19, Loveridge filed an internal Union complaint against Sullivan for his refusal to call a replacement (Pet. App. B-9).[2]

Pursuant to internal Union proceedings, it was determined that Sullivan had violated Union rules. As punishment, he was barred from use of the dispatch hall for ten days, thus effectively suspending him from work for any PMA employer (Pet. App. B-9). During these proceedings, Sullivan was reminded that he had the option of dropping his Union membership and converting to "non-member, pro rata" status, thereby avoiding suspension of his dispatch hall rights (Pet. 5; Pet. App. B-10). Sullivan rejected this option (Pet. App. B-10).[3]

2. The Board, adopting the decision of its administrative law judge, concluded that (Pet. App. B-15 to B-16) "by refusing to dispatch Larry Sullivan for work for employer-members of PMA for reasons other than his failure to tender dues, which included his share of the expenses of the dispatching hall, [the Union] violated

[2]The same day Sullivan offered, and the Union accepted, the full amount owed to the Union (Pet. App. B-8).

[3]While Sullivan's case was being processed by the Union, the Union issued a notice to its membership concerning dues collection, including a recitation of the Union's rule regarding payments of fines and assessments (note 1, *supra*), and a statement that "the Officers have instructed the girls in the dues office that if payments are not made on Caucus and Convention assessments and fines, dues will not be accepted and you *WILL NOT BE ALLOWED TO WORK*" (Pet. App. B-12; emphasis in original).

Section 8(b)(1)(A) and (2) of the Act."[4] The Board explained that "[i]ntegral to the policy underlying both Sections was the intent to separate membership obligations owed by employees to their labor organizations from the employment rights of those employees" (Pet. App. B-12 to B-13), citing *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954), and *Scofield* v. *NLRB*, 394 U.S. 423, 428-429 (1969). Consequently, while a labor organization is free, under the proviso to Section 8(b)(1)(A), "to prescribe its own rules with respect to the acquisition or retention of membership therein," its ability to enforce such rules is restricted by " 'barring enforcement of a union's internal regulations to affect a member's employment status' " (Pet. App. B-13), citing *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 195 (1967).

The Board rejected the Union's claim that its imposition of the penalty was proper since Sullivan could have avoided suspension of his work opportunities by resigning from the Union. The Board pointed out that external, or job-related sanctions, as contrasted with internal union sanctions, may not be applied against union members, no less than non-members (Pet. App. B-17). The Board entered an appropriate remedial order (Pet. App. B-23 to B-25).

3. The court of appeals sustained the Board's findings and conclusions, and enforced its order. The court agreed that unions may not enforce their internal regulations (in matters other than payment of dues and initiation fees) " 'to affect a member's employment status,' " and that the Union's action here did, in fact, "deprive Sullivan of

[4]The Board also found that "by threatening to and by instituting discipline against Sullivan for refusing to voluntarily remove himself from his job for reasons other than his failure to tender dues * * * [the Union] violated Section 8(b)(1)(A) of the Act" (Pet. App. B-16).

work" (Pet. App. A-5). The court also agreed that there was no merit to the Union's contention that Sullivan had the "option" of resigning from the Union: "To present a union member with the Hobson's choice between surrender of his membership or temporary loss of employment cannot be characterized fairly as action not 'affecting an individual's employment status.' It is sophistry to insist otherwise" (Pet. App. A-6).

ARGUMENT

Nearly 25 years ago, in *Radio Officers' Union* v. *NLRB*, *supra*, 347 U.S. at 40 (footnotes omitted), this Court recognized that:

> The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§8(a) (3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to §8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if * * * "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Since that time it has been settled that, while unions are entitled to discipline their members for violating internal union rules, they may not do so by means of depriving members of the opportunity to work, so long as such members tender their dues in accordance with Sections 8(a)(3) and 8(b)(2). *NLRB* v. *Allis-Chalmers Manufacturing Co.*, *supra; Scofield* v. *NLRB*, *supra*; and *NLRB* v. *Boeing Co.*, 412 U.S. 67, 73-74 (1973). Thus, the court of appeals correctly noted (Pet. App. A-4 to A-5) that in

Boeing this Court reaffirmed " 'that Congress intended to distinguish between the external internal enforcement of union rules, and [that] therefore the Board [has the] authority to pass on those rules affecting an individual's employment status but not on his union membership status.' "

In the instant case it is undisputed that Sullivan did make a timely tender of the dues required under the Union-PMA contract to entitle him to use the dispatch hall. The Union's "external" penalty—barring him from using the dispatch hall for ten days for failure to make timely tender of other sums (fines and assessments) required by the Union—clearly deprived him of work for a reason other than that permitted by the Act, and therefore violated Sections 8(b)(1)(A) and 8(b)(2).

The Union (Pet. 7-8) seeks to avoid the application of these settled principles by contending that, because Sullivan had the option of resigning from the Union rather than accept the penalty, its disciplinary action was permissible. There is no merit to that contention. The apparent premise of the Union's argument is that job-related discipline may be meted out to union members so long as they have the "escape hatch" of resignation. *Scofield* does not assist petitioner. There, the Court upheld the union-imposed internal sanctions of fines and suspension from membership, noting that the member could escape such union discipline by resigning. 394 U.S. at 430. However, the Court made clear that legitimate union rules could not be enforced against any individual by "use [of] the emoluments of the job to enforce the union's rules." *Id.* at 429.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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